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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUAN GRACIANO et al., Plaintiffs and Appellants, v. K.A.M.C.O. ENTERPRISES, INC., Defendant and Respondent.	D053806 (Super. Ct. No. GIE26667)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Plaintiffs Juan Graciano (Graciano) and his wife Olga Graciano (Olga) appeal a judgment entered in favor of defendant K.A.M.C.O. Enterprises, Inc. (KAMCO) after a court trial. Plaintiffs sued KAMCO for personal injuries Graciano sustained when he fell off a second-story walkway in a new home being constructed by KAMCO.[1] The injury

1 Plaintiffs' complaint includes a cause of action for loss of consortium on behalf of Olga.

occurred while Graciano was performing painting work for his employer, Houston Ridge Painting (Houston), the contractor KAMCO hired to paint the interior of the house.

Relying on *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), the court ruled that KAMCO was not liable for plaintiffs' injuries because although KAMCO retained minimal control over safety conditions on the premises, it did not retain control over safety conditions that affirmatively contributed to Graciano's injury. Plaintiffs contend (1) the evidence was insufficient to support the court's finding that KAMCO did not retain control over safety conditions that affirmatively contributed to Graciano's injury; and (2) because certain regulations in the California Code of Regulations impose a nondelegable duty on KAMCO, the court committed reversible error by not applying a negligence per se presumption under Evidence Code section 669. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

KAMCO is owned and operated by Ray Smith. On behalf of KAMCO, Smith supervised the construction of premises where Graciano was injured and hired all of the subcontractors on the project, including Houston.

Around the time Houston contracted with KAMCO, Smith met with Houston's owner, Houston Robert Ridge, Jr., and Graciano at the jobsite to discuss the painting work Houston was to perform. At that "walk-through" meeting or a second walk-through with Smith and Graciano, Ridge pointed out the absence of a railing on the upstairs

walkway.[2] Ridge asked Smith how they were going to "paint it up there," and Smith told them to use scaffolding that was on the site. Ridge instructed Graciano not to spray paint the ceiling from the second floor, but instead to spray it from the scaffolding or from the bottom floor using extensions.

On the day of the accident, Graciano picked up the company van at Ridge's house and went to the jobsite with two other Houston employees. Ridge recently had promoted Graciano to the position of supervisor on the jobsite. As supervisor, Graciano was responsible for making sure the painting work was performed correctly and safely. Smith was at the jobsite but did not give Graciano instructions or have any other discussion with him before the accident. Graciano went to the second floor and began to spray paint the ceiling from the open walkway. He was walking backwards while spraying the ceiling when his left heel caught on something, causing him to lose his balance and fall off the walkway onto the first floor. As a result of the fall, Graciano was injured and underwent multiple surgeries.

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[2] The record is somewhat unclear as to whether the temporary railing was up when Graciano and Ridge first met with Smith at the jobsite. Smith testified at one point that the railing was up at that time, but later testified that Ridge told Graciano at the initial meeting to paint the ceiling from the bottom floor or use the scaffold, and that he (Smith) knew the railing was down. Graciano testified that the railing was *not* up at the time of the first walk-through. Ridge's testimony that he pointed out the absence of a railing appears to refer to the first walk-through meeting, but shortly before he gave that testimony, he was asked if he discussed with Graciano how the work was to be performed, and responded: "Yes. We went with Mr. Smith and walked through the house *again* . . . ." In any event, the record shows that at some point before the day of Graciano's accident, Ridge and Graciano were aware there was no railing on the upstairs walkway.

Plaintiffs filed a complaint against KAMCO, Smith, and his wife Karen Smith. The complaint included causes of action by Graciano for negligence[3] and a cause of action by Olga for loss of consortium. The defendants collectively filed a motion for summary judgment or, alternatively, summary adjudication of each of the causes of action in the complaint. Although the court's order on the motion appears to deny summary judgment and only partially grant the motion for summary adjudication, the parties and the court construed the order as effectively granting summary judgment in favor of the Smiths and denying summary judgment as to KAMCO.[4]

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[3] The complaint's first cause of action on behalf of Graciano is entitled "General Negligence and Premises Liability." The second cause of action on behalf of Graciano is entitled "General Negligence and Negligence Per Se," although it does not allege a violation of a statute or regulation.

[4] On its face, the court's minute order on defendants' summary judgment/ adjudication motion is unclear as to which causes of action were summarily adjudicated, and as to which defendants the summary judgment and adjudication rulings applied. The order states: "Defendants' motion for summary judgment is DENIED. There is a triable issue of material fact as to whether [KAMCO's] representative, Ray Smith, retained control over safety conditions that affirmatively contributed to the employee's injury. [¶] Defendant Smith's motion for summary adjudication as to the negligence/premises liability cause[s] of action [is] GRANTED. Summary adjudication as to the loss of consortium cause of action is DENIED."

The order reasonably could be construed as granting summary adjudication of Graciano's cause of action for "General Negligence and Premises Liability" as to the Smiths only, and denying summary adjudication of the other two causes of action as to all defendants. The order, on its face, does not grant summary *judgment* in favor of the Smiths, and the record on appeal does not contain a judgment in their favor. However, the parties apparently agree that the court effectively granted summary judgment as to the Smiths on all causes of action. At the beginning of trial, the court queried: "So I'm going to assume that Ray Smith and Karen Smith, individually, are not in the lawsuit?" Defense counsel replied, with no opposition from plaintiffs: "That is correct, Your Honor. Your Honor granted their motion for summary judgment previously."

After a bench trial, the court entered judgment in KAMCO's favor based on *Hooker* and the finding that, although KAMCO retained minimal control over safety conditions at the jobsite, it "did not retain control over safety conditions that affirmatively contributed to [Graciano's] injury."

DISCUSSION

I. *Sufficiency of the Evidence*

Graciano contends there is insufficient evidence to support the court's finding that KAMCO did not retain control over safety conditions that affirmatively contributed to Graciano's injury. "In reviewing a challenge to the sufficiency of the evidence, we are bound by the substantial evidence rule. All factual matters must be viewed in favor of the prevailing party and in support of the judgment. All conflicts in the evidence must be resolved in favor of the judgment." (*Heard* v. *Lockheed Missles & Space Co.* (1996) 44 Cal.App.4th 1735, 1747.) We begin with a review of California law regarding the tort liability of a hirer of an independent contractor for injuries arising out of the contractor's work.

"At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work." (*Privette* v. *Superior Court* (1993) 5 Cal.4th 689, 693 (*Privette*).) However, under the "peculiar risk doctrine," a person who hires an independent contractor to perform inherently dangerous work can be held liable for injuries to others caused by the contractor's negligent performance of the work. (*Id.* at p. 691.) The rationale for this exception, which imposes liability without fault on the hirer, is "to ensure that injuries

caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such injuries." (*Ibid*.)

In *Privette*, the California Supreme Court sharply limited the scope of the peculiar risk doctrine by holding that because of the availability of workers' compensation coverage, a hirer's liability under the doctrine does not extend to employees of the hired contractor who are injured on the job. (*Privette*, *supra*, 5 Cal.4th at p. 702.) In *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 256 (*Toland*), the Supreme Court explained: "Because the Workers' Compensation Act [citation] shields an independent contractor from tort liability to its employees, applying the peculiar risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury."

In *Hooker*, the California Supreme Court considered whether the hirer of an independent contractor can be held liable for on-the-job injury to the contractor's employee where the hirer negligently exercised retained control over safety conditions at the worksite. The *Hooker* court concluded the hirer is not liable to the contractor's employee merely because the hirer retained control over safety conditions on the worksite, but is liable to the employee if its "exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) The court reasoned that "because the liability of the contractor, the person primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage,

it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the ability to exercise control over safety at the worksite. In fairness, . . . the imposition of tort liability on a hirer should depend on whether the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee." (*Id.* at p. 210.)

In *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671 (*Kinsman*), the California Supreme Court explained that it is useful to view *Privette* and its progeny in terms of delegation and that, because of the availability of workers' compensation, strong policy reasons favor the ability of a hirer of an independent contractor to delegate to the contractor the responsibility for performing the work safely. "Nonetheless, when the hirer does not fully delegate the task of providing a safe working environment, but in some manner *actively participates* in how the job is done, and that participation *affirmatively contributes* to the employee's injury, the hirer may be liable in tort to the employee." (*Kinsman*, at p. 671, italics added.)

Where, as here, the hirer is a landowner and the independent contractor's employee is injured by a hazardous condition on the hirer's premises, the hirer's delegation of responsibility for employee safety to the contractor "includes taking proper precautions to protect against obvious hazards in the workplace. There may be situations . . . in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury. [However], when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent

contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to contractor's employee if the contractor fails to do so." (*Kinsman*, *supra*, 37 Cal.4th at pp. 673-674.)

Applying these principles to the present case, we conclude substantial evidence supports the court's finding that KAMCO's retention of control over safety conditions on the worksite premises did not affirmatively contribute to Graciano's injury. *Kinsman* instructs that a hirer affirmatively contributes to an injury to a contractor's employee when the hirer "*actively participates* in how the [work] is done, and that participation affirmatively contributes to the employee's injury." (*Kinsman*, *supra*, 37 Cal.4th at p. 671, italics added; *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348 (*Millard*) [""Affirmative contribution' occurs where a general contractor '"is actively involved in, or asserts control over, the manner of performance of the contracted work."'"].)

Here, there is substantial evidence that KAMCO did not actively participate in how Graciano's painting work was to be done. Smith, who was KAMCO's representative on the jobsite, testified that he did not give Graciano any instructions regarding his work or have any other discussion with him on the day of the accident. In addition, defense counsel read Graciano's deposition testimony that Smith did not give him any instructions that morning, and Graciano testified at trial that he made the decision of where to start painting and how he would paint the ceiling. Because the evidence reasonably supports the finding that KAMCO did not actively participate in how Graciano's work was to be

done, the court reasonably could find that any control KAMCO retained over safety conditions at the worksite did not affirmatively contribute to Graciano's injury.

The *Hooker* court recognized that "affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, *if the hirer promises to undertake a particular safety measure,* then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3, italics added.) This language indicates that for a hirer to be held liable to a contractor's employee for an omission to undertake a particular safety measure, the hirer must have promised to undertake that safety measure, and the employee's injury must have resulted from the employee's or contractor's reliance on the promise. Here, there was no evidence that Smith promised Graciano or his employer that a guardrail would be installed on the second-story walkway and, in any event, there could be no reasonable reliance on such a promise because the absence of a guardrail presented an open and obvious hazard of which Graciano was fully aware before his accident.

As noted, "when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, . . . the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so." (*Kinsman, supra,* 37 Cal.4th at pp. 673-674.) Here, the independent contractor Ridge addressed the safety hazard that caused Graciano's injury through the reasonable safety precaution of specifically directing Graciano not to paint the ceiling from the

unprotected walkway because of the absence of a guardrail, but instead to use scaffolding or paint the ceiling from the bottom story using extensions. Graciano was injured because he chose to disregard that safety precaution. To the extent additional safety precautions should have been implemented, KAMCO delegated the responsibility to implement them to Houston and cannot be held liable for Houston's failure to do so. Substantial evidence supports the court's finding that although KAMCO retained some control over safety conditions on the worksite, its conduct did not affirmatively contribute to Graciano's injury.

II. *Nondelegable Duty*

Graciano contends certain regulations in the California Code of Regulations imposed a nondelegable duty on KAMCO to maintain a temporary guardrail on the second-story walkway, and KAMCO breached that duty.[5] Therefore, Graciano argues,

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[5] Graciano cites the following regulations promulgated under the California Occupational Safety and Health Act (Cal-OSHA) (Lab. Code, § 6300 et seq.) and set forth in California Code of Regulations:

"Unless otherwise protected, railings as set forth in Section 1620 shall be provided along all unprotected and open sides, edges and ends of all built-up scaffolds, runways, ramps, rolling scaffolds, elevated platforms, surfaces, wall openings, or other elevations 7 1/2 feet or more above the ground, floor, or level underneath" (Cal. Code Regs., tit. 8, § 1621(a));

"Unprotected sides and edges of stairway landings shall be provided with railings. Design criteria for railings are prescribed in Section 1620 of these safety orders" (Cal. Code Regs., tit. 8, § 1626(b)(5)); and

"(a) This section shall apply to temporary or emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways.

"(b)(1) Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers. [¶] . . . [¶]

"(g) Temporary floor openings shall have standard railings.

the court committed reversible error by not applying a negligence per se presumption under Evidence Code section 669. We reject this argument because even if Cal-OSHA regulations imposed a nondelegable duty on KAMCO, KAMCO can be held liable to Graciano only to the extent its breach of the nondelegable duty affirmatively contributed to Graciano's injury.

"'A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor.' [Citation.] A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety." (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146 (*Evard*).) "'[A] nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.' [Citation.] The characterization of a duty as nondelegable is thus a shorthand way of saying that the responsible party cannot escape liability altogether by delegating this duty to someone else." (*Ruiz v. Herman Weissker, Inc*. (2005) 130 Cal.App.4th 52, 63 (*Ruiz*).)

"(h) Floor holes, into which persons can accidentally walk, shall be guarded by either a standard railing with standard toeboard on all exposed sides, or a floor hole cover of standard strength and construction that is secured against accidental displacement. While the cover is not in place, the floor hole shall be protected by standard railing." (Cal. Code Regs., tit. 8, § 1632.)

In 1999, the Legislature amended Labor Code section 6304.5 to allow occupational safety and health standards and orders promulgated under the Labor Code to be used "to establish standards and duties of care in negligence actions against private third parties." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 924 (*Elsner*).)[6] In *Elsner*, the California Supreme Court noted that "[t]he key sentence of Labor Code section 6304.5 is in its second paragraph: 'Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation.' Evidence Code section 452 allows judicial notice of state statutes and regulations. [Citation.] Evidence Code section 669 allows proof of a statutory violation to create a presumption of negligence in specified circumstances. It codifies the common law doctrine of negligence per se,

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6 Labor Code section 6304.5 provides: "It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety.

"Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. It is the intent of the Legislature that the amendments to this section enacted in the 1999-2000 Regular Session shall not abrogate the holding in *Brock v. State of California* (1978) 8l Cal.App.3d 752 [(*Brock*)]."

As noted in *Elsner*, the *Brock* holding referenced in the statute is that the State of California cannot be sued for breach of its Cal-OSHA duties. (*Elsner*, *supra*, 34 Cal.4th at p. 933.)

pursuant to which statutes and regulations may be used to establish duties and standards of care in negligence actions." (*Elsner, supra*, 34 Cal.4th at p. 927, fn. omitted.)

However, in considering the retroactivity of the 1999 amendment to Labor Code section 6304.5, the *Elsner* court concluded the amendment did *not* expand a defendant hirer's duty of care and therefore could be applied retroactively. (*Elsner, supra*, 34 Cal.4th at pp. 937-938.) Based largely on that conclusion, this court in *Millard, supra*, 156 Cal.App.4th at pages 1351-1352, held that amended Labor Code section 6304.5 did not affect the limitations of *Privette* and its progeny on the liability of a hirer of an independent contractor to an employee of the contractor for an on-the-job injury. *Millard* explained: "[A]s the court in *Elsner* emphasized, amended [Labor Code] section 6304.5 was not intended to expand a [hirer's] duty of care to an injured employee of [an independent contractor]. This includes the limitations on such a duty imposed by *Privette* and its progeny. Under amended [Labor Code] section 6304.5, safety regulations may be admissible in actions by employees of [independent contractors] brought against [hirers] that retain control of safety conditions, *but only where the* [*hirer*] *affirmatively contributed to the employee's injuries*." (*Id.* at p. 1352, italics added.)[7]

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7 More than two years before the *Millard* decision was filed, this court in *Ruiz* had already decided, without considering *Elsner*, that "a hirer's liability for breaches of a nondelegable duty to maintain its property in a reasonably safe condition is subject to the limitations announced in *Privette* and its progeny." (*Ruiz, supra*, 130 Cal.App.4th at p. 63.) Accordingly, *Ruiz* held that "an independent contractor's employee cannot recover against the property owner for breach of such a nondelegable duty unless the owner's retained control affirmatively contributed to the injury." (*Id.* at pp. 63-64.)

In *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1279, the Court of Appeal agreed with *Millard* that "Labor Code section 6304.5, as construed in *Elsner*, did not in any way abrogate the *Privette-Toland* doctrine, nor expand a general contractor's duty of care to an injured employee of a subcontractor." The *Madden* court further noted that ". . . *Elsner* did not discuss or distinguish *Privette*, *Toland*, or *Hooker*. Further, *Madden* found no indication in *Elsner* or in the text of amended Labor Code section 6304.5 that the Legislature intended to bring about a sweeping enlargement of the tort liability of those hiring independent contractors by making them civilly liable for Cal-OSHA or other safety violations resulting in injuries to the contractors' employees." (*Id.* at p. 1280.) Accordingly, *Madden* held that "safety regulations are only admissible in actions by employees of subcontractors brought against general contractors where other evidence establishes that the general contractor affirmatively contributed to the employee's injuries." (*Ibid.*)

The Court of Appeal in *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661 similarly held that even if a statute or regulation imposes a nondelegable duty, "the liability of a hirer for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation remains subject to the *Hooker* test. [Citations.] Under that test, the hirer will be liable if its breach of regulatory duties affirmatively contributes to the injury of a contractor's employee." (*Id.* at p. 673, fn. omitted; accord *Evard*, *supra*, 153 Cal.App.4th at p. 147.)

The overwhelming weight of authority compels us to conclude that even if KAMCO breached (or is presumed, under Evidence Code section 669, to have breached)

a regulatory duty to provide a guardrail on the second-story walkway from which Graciano fell, KAMCO is not liable to Graciano because, as we discussed in part I, *ante*, substantial evidence supports the court's finding that KAMCO's conduct did not affirmatively contribute to Graciano's injury. Based on that finding, the court properly entered judgment in KAMCO's favor.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.